STATE OF MICHIGAN

COURT OF APPEALS

LENAWEE COUNTY,

Plaintiff-Appellant,

v

DAVID WAGLEY and BARBARA WAGLEY,

Defendants-Appellees,

and

BANK OF LENAWEE and PAVILLION MORTGAGE,

Defendants.

UNPUBLISHED
March 22, 2007

No. 268819
Lenawee Circuit Court
LC No. 05-001960-CC

LENAWEE COUNTY,

Plaintiff-Appellant,

v

ROBERT D. GARDENER and MICHELE A. GARDENER,

Defendants-Appellees,

and

SKY BANK and UNITED BANK & TRUST,

Defendants.

Docket No. 268820
Lenawee Circuit Court
LC No. 05-001961-FC

LENAWEE COUNTY,

Plaintiff-Appellant,

v

Docket No. 268821
Lenawee Circuit Court
LC No. 05-001962-CC

MARY HALSTEAD,

Defendant-Appellee,

and

LENCO CREDIT UNION and ALDEN STATE BANK,

Defendants.

LENAWEE COUNTY,

Plaintiff-Appellant,

v

Docket No. 268822
Lenawee Circuit Court
LC No. 05-00200-CC

ROBERT L. SELLERS, SR.,

Defendant-Appellee,

and

UNITED MORTGAGE COMPANY,

Defendant.

LENAWEE COUNTY,

Plaintiff-Appellant,

v

Docket No. 268823
Lenawee Circuit Court
LC No. 05-002001-CC

RICHARD F. BARON, MARY SHARON BARON, and BARON FAMILY TRUST DATED DECEMBER 30, 1992,

Defendants-Appellees.

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

In these consolidated appeals plaintiff Lenawee County appeals by leave granted a January 18, 2006, "Order Requiring a Total Taking" of defendants' property in these condemnation actions under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.* The trial court denied plaintiff's motion for reconsideration. We reverse and remand.

These cases arise out of the expansion and improvement of Lenawee County Airport, including a lengthening of the runway. Plaintiff determined that it was necessary to acquire certain parcels of property to implement the runway improvement. Of import to this matter, it was determined that plaintiff needed to acquire avigation easements over defendants' properties. The easements were deemed necessary because defendants' residential properties are located in a Runway Protection Zone ("RPZ"), a trapezoidal shaped area that "begins 200 feet beyond the end of the area useable for takeoff and landing," and is maintained to "enhance the protection of people and property on the ground."[1] Essentially, the easements required that defendants provide plaintiff with the right to maintain the airspace above a certain height on defendants' properties free from obstructions, and the right to create such noise, fumes, and particulates as may be inherent for using the airspace for airport purposes.

Plaintiff presented each defendant with a good faith offer to acquire the necessary avigation easement. Defendants refused the offers, and plaintiff initiated the present actions seeking condemnation of the properties. In response, each defendant filed substantially similar motions grounded in MCL 213.54(1) " to compel a total taking." Defendants argued that their residences were located in a RPZ and that FAA regulations required that the homes be razed and the sites cleared, resulting in destruction of the value or utility of the remainder of the parcels.

In response to defendants' motion, plaintiff argued that the question of whether the practical value or utility of defendants' properties has been destroyed was a question of fact for a jury. Plaintiffs also argued that defendants presented no evidence regarding any reduction in value of their properties and presented evidence that other residential properties encumbered by avigation easements generally have a reduction in value of approximately 6%. Plaintiff also noted that defendants' properties were currently encumbered by avigation easements.

Following hearings on defendants' motion, the trial court granted the motion. In its January 18, 2006, order, the court stated in part:

> The Court has reviewed the briefs and materials submitted by the parties and entertained oral argument. The Court has determined that the Federal Aviation Administration regulations required the removal of Defendants' home as a result of its location in a Runway Protection Zone as a matter of law. Therefore, no issue of fact exists because the acquisition of the portion of the parcel of property actually needed by Plaintiff destroys the practical value or utility of the

[1] Federal Aviation Administration ("FAA") Policy and Procedures Memorandum, 5300.1B, issued February 5, 1999, ¶¶ 2.j., 3.b.

remainder of the parcel, requiring Plaintiff to acquire and pay just compensation for the whole parcel pursuant to MCL 213.54(1).[2]

I

Plaintiff argues that the trial court erred in finding, as a matter of law, that FAA regulations preclude residences in RPZs. The interpretation of a regulation is a question of law reviewed de novo by this Court. See, e.g., *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

FAA Policy and Procedures Memorandum, 5300.1B, issued February 5, 1999, discusses the agency's "Runway Protection Zone and Airport Object Clearing Policy." Although paragraph 3.b.(1) provides that RPZs must be clear of "incompatible land uses," and defines that term to include "residences," paragraph 3.b.(2) goes on to provide:

> Airport Improvement Program Investments Involving New Runways or Runway Extensions at Existing Airports. The required Runway Protection Zone should be acquired in fee and cleared subject to the clearing requirements and land use restrictions listed in paragraph 3.b.(1). If fee acquisition is determined to be infeasible, for any part of the Runway Protection Zone, that portion of the Runway Protection Zone must be protected by an avigation easement, (see FAA Order 5100.37) against incompatible land use restrictions listed in paragraph 3.b.(1). In all cases, the Runway Safety Area portion of the Runway Protection Zone must be acquired in fee and cleared, subject to all conditions listed per paragraph 3.b.(1).
>
> The avigation easement must provide protection for FAR Part 77, Subpart C, Surfaces, Obstacle Free Zone, Runway Object Free Area, Clearways, NAVAID Critical Areas, Approach Light Clearing Planes, Runway Visibility Zones, Obstacle Clearing Planes (PAPI, VASI, PLASI), Airport Traffic Control Tower lines of sight, and departure obstacle identification surface clearances (refer to Chapter 12 of Order 8260.3B). This easement must prohibit incompatible land uses as listed in paragraph 3.b.(1). If the present land use on the proposed easement property is incompatible, it must be properly mitigated and approved by the FAA.

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[2] On January 31, 2006, plaintiff moved for reconsideration of the trial court's order requiring a total taking of defendants' properties. Plaintiff challenged the trial court's ruling that defendants' homes were required to be removed from the RPZ "as a matter of law." Plaintiff argued that there was no specific "federal regulation" applicable to this matter, and that while the FAA has a policy to "strongly encourage" fee ownership of parcels within an RPZ, the evidence submitted by plaintiff indicated that avigation easements are an acceptable alternative. Although the trial court denied the motion, in so doing the trial court appeared to acknowledge that finding a total taking "as a matter of law" may not have been appropriate, but the court noted that "it stated on the record several reasons why it felt a total taking was necessary."

> In lieu of an avigation easement, Runway Protection Zone protection may be provided by written agreements with a public agency (i.e., State Highway Division) to control use of the land. These agreements must include the incompatible land use restrictions listed in paragraph 3.b.(1) and be approved by the FAA. [Emphasis in original.]

Generally speaking, "residences" are an "incompatible land use" and plaintiff "should" acquire the properties in fee. However, the plain language of the memorandum indicates that acquiring the properties in fee is not necessary, and that an alternative to a complete acquisition is obtaining an avigation easement. Paragraph 3.b.(2) states that, "[i]f the present land use on the proposed easement property is incompatible, it must be properly mitigated and approved by the FAA." Thus, contrary to the trial court's interpretation, FAA regulations do not require plaintiff to acquire defendants' residences in fee as a matter of law simply as a result of their location within an RPZ. Rather, an avigation easement is an acceptable alternative if approved by the FAA.

Plaintiff submitted evidence to support its assertion that the "County of Lenawee, in conjunction with the State of Michigan and the FAA, determined that acquisition of an avigation easement was appropriate." Plaintiff presented a letter from Irene Porter, the Manager of the Detroit Airports District Office of the FAA. The letter stated in pertinent part:

> While the FAA requires that a public use airport control the runway protection zones and associated aircraft approaches for all runways, it should **not be** interpreted that fee simple ownership of all properties in a RPZ is required. Alternative methods for control can include avigation easements, deed restrictions, or airport zoning adopted by each local unit of government who regulate property in the proximity of an airport. Ownership of land within a RPZ is determined by what is feasible and practicable. The evaluation of feasibility and practicability is determined by the airport sponsor, and for this case, resides with Lenawee County. [Emphasis in original.]

Plaintiff also presented the FAA response of Christopher Blum, the FAA regional administrator of the Great Lakes Region. The FAA stated in the response that FAA regulations do not prohibit the location of residences and places of public assembly within an RPZ. The FAA further stated that:

> The FAA requires that a public use airport control the RPZ and associated approach surfaces for all runways. The FAA **does not** require fee simple ownership of all properties in an RPS in order to establish or maintain that control. Alternative methods for control may include avigation easements, deed restrictions, or airport zoning adopted by each local unit of government that regulates property near the airport. The State of Michigan, acting on behalf of the FAA, in coordination with the airport sponsor, makes this determination. It is not a violation of FAA regulations for the airport sponsor to seek easements rather than fee simple ownership of land in an RPZ.

The FAA further responded that:

> This Lenawee County Airport Improvement project underwent thorough environmental, noise, and safety reviews before construction. The State of Michigan and FAA conducted these reviews. The Airport Sponsor (County) completed an Environmental Assessment (EA) in January 2003. The State of Michigan and FAA issued a joint Finding of No Significant Impact (FONSI) on January 17, 2003. The EA identified the expanded RPZ within the document. The County held a formal public hearing in November 2001 as part of the environmental process. This public hearing gave the public an opportunity to comment on this airport development project. The County received all necessary permits and approvals based on the findings of the EA and FONSI. To further supplement the January 2003 EA and FONSI, the State of Michigan approved an environmental categorical exclusion document for the subject avigation easements and obstruction removal on February 18, 2005. The categorical exclusion did not require public comment.

Additionally, the response stated that:

> The RPZ for Runway 5/23 is changing because the runway was shifted 500 feet to the southeast (further away from the properties) and improved to allow larger, faster aircraft to use the runway. The RPZ is a ground-level surface, and does not directly relate to the height of aircraft above the properties.
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> The change in aircraft type that will be using Runway 5/23 requires a shallower approach surface. This does not mean that aircraft will be flying lower than they currently do. It reflects the lower elevation allowed for potential obstructions.
>
> Prior to the runway shift a typical approach was approximately 42 feet above the roofline of the house on parcel E62. With the shift the typical approaching aircraft will be 89 feet above the roofline. Because the runway end is moving away from the properties, the actual aircraft elevation above the houses will be higher.
>
> Per FAA standards, the residences are not obstructions to the approach surface or to air navigation. These conditions are considered safe by FAA standards.

Plaintiff presented documentary evidence that the avigation easements were "approved by the FAA." Thus, the trial court erred in determining that a total taking was required under FAA regulations "as a matter of law."

II

Plaintiff maintains that the trial court erred by finding that the practical value or utility of the remainder of defendants' properties was destroyed and that a total taking was required under MCL 213.54(1). We agree.

MCL 213.54(1) provides:

> If the acquisition of a portion of a parcel of property actually needed by an agency would destroy the practical value or utility of the remainder of that parcel, the agency shall pay just compensation for the whole parcel. The agency may elect whether to receive title and possession of the remainder of the parcel. The question as to whether the practical value or utility of the remainder of the parcel of property is in fact destroyed shall be determined by the court or jury and incorporated into its verdict.

When the government takes private property pursuant to its constitutional power of eminent domain, see Const 1963, art 10, § 2, it must do so for a public use and must pay to the property owner just compensation-an amount that "takes into account all factors relevant to [the] fair market value" of that property. *Silver Creek Drain Dist v. Extrusions Div, Inc,* 468 Mich 367, 373-374, 378-379; 663 NW2d 436 (2003). A condemnee's damages are, in general, measured by the fair market value of the property taken. But where only a portion of the whole parcel is taken, it is possible for the remaining property to also suffer damages attributable to the taking. *Johnstone v Detroit, GH & M Ry Co,* 245 Mich 65, 81, 222 NW 325 (1928); *Dep't of Transportation v Sherburn,* 196 Mich App 301, 305; 492 NW2d 517 (1992). In such a case, the value of the property taken is allowed as direct compensation, but the remaining portion's decrease in value, by virtue of the use made of the property taken, is also allowable as compensation even though this is strictly consequential damage in nature. *In re Widening of Fulton Street,* 248 Mich 13, 20-21; 226 NW 690 (1929); *Johnstone, supra* at 81. This diminution in value, or "severance damages," is measured by calculating the difference between the fair market value of the remaining property before and after the taking. *Sherburn, supra* at 305. Thus, "[t]he proper measure of damages in a condemnation case involving a partial taking consists of the fair market value of the property taken plus severance damages to the remaining property." *Sherburn, supra* at 306. A condemning agency is required to pay just compensation for the whole parcel of property if acquiring only a portion of it would destroy the practical value or utility of the remainder. MCL 213.54(1); M Civ JI 90.18.[3] The burden of proof is on the owner to show by a preponderance of the evidence that the practical value or utility of the remainder of the property has been destroyed. M Civ JI 90.18. The issue of whether the practical value or utility of the remainder of the parcel of property is in fact destroyed is a question to be determined by the finder of fact and included in the verdict. MCL 213.54(1).

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[3] M Civ JI 90.18, which pertains to a determination of "total taking" under MCL 213.54(1), states:

> The [name of condemning authority] has the right and duty to acquire and take the entire property whenever the acquisition of the part actually needed would destroy the practical value or utility of the remainder of the property. It is for you to decide whether or not the practical value or utility of the remainder is, in fact, being destroyed.
>
> The burden of proof is on the owner to show by a preponderance of the evidence that the practical value or utility of the remainder of the property has been destroyed.

Here, the trial court stated its view that "the value of these homes, there may be residual value for some people who may want to live there, but I don't think these people have to live there." The court stated a belief that "forcing Defendant's [sic] to remain in their home constitutes an unnecessary risk to their lives." In support of this belief, the trial court stated that "there will be occasions when the winds are funny and people will actually be landing coming this way and they could skid off, or you know, heaven help us that we ever had a plane that would have a malfunction, say, in its landing gear," and that "[p]eople do make mistakes." The court stated that defendants could not be expected to "live under the threat of imminent danger in a house where the RPZ is, at the minimum point, is a matter of a few feet over their chimney."

The trial court's finding that a total taking was required was based not on evidence submitted by defendants, but, rather, on the court's subjective findings that there may be mistakes made, or unusual circumstances presented, that may endanger the lives of the persons in the homes. But the proper standard to be applied when determining whether an agency acquiring a portion of a parcel of property shall pay a property owner just compensation for a "total taking" is whether the partial acquisition would destroy the practical value or utility of the remainder of that parcel. Although the trial court stated that the avigation easements destroyed the practical value or utility of the properties, the court made no findings based on any evidence to support the statement. To the contrary, the trial court specifically found that "there may be some residual value for some people who want to live there." Indeed, plaintiff presented evidence that "there are many airports which have obtained avigation easements in the RPZs which were acquired over existing residences" and that "These avigation easements include the same, or substantially the same conditions imposed by the avigation easements being acquired in this matter." Plaintiff also presented evidence that the new runway "is longer and further from the affected residences," and that this "will enable pilots to land further from the effected residences, thus reducing noise levels in comparison with the existing runway." Plaintiff also presented evidence that "the actual aircraft elevation above the houses will be higher," and that the State of Michigan and the FAA conducted "thorough environmental, noise, and safety reviews before construction," and that both entities issued a "joint Finding of No Significant Impact." This evidence suggests, from a practical standpoint, the easement may have little, if any, negative impact on the affected properties. Plaintiff also presented evidence that properties encumbered by avigation easements generally suffer an approximate 6% diminution in value.

In light of the evidence presented by plaintiff in response to defendant's motion, the trial court erred by finding as a matter of law that the avigation easements resulted in a total taking of defendants' properties. Whether defendants suffered a total taking - that is, whether the practical value or utility of the remainder of the parcels was destroyed - is a disputed question of fact relevant to the determination of just compensation. See *K & K Construction, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 551-552; 705 NW2d 365 (2002). The amount to be recovered by the property owner is generally left to the trier of fact, as a matter of "sound judgment and discretion based upon a consideration of all the relevant facts in a particular case." *Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 577; 711 NW2d 453 (2006), quoting *In re Widening of Michigan Ave*, 280 Mich 539, 548; 273 NW 798 (1937). The trial court improperly invaded the province of the jury and deprived plaintiff of its right to a jury trial on the issue of just compensation.

Reversed and remanded. Jurisdiction is not retained.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio